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11 National Electronics Warranty LLC

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

11 PETER WILSON, on behalf of himself  
12 and all others similarly situated,

13 Plaintiffs,

14 v.

15 GATEWAY, INC.; NATIONAL  
16 ELECTRONICS WARRANTY LLC,

17 Defendants.

CASE NO. CV-09-07560 GW (VBKx)

**NATIONAL ELECTRONICS  
WARRANTY LLC'S REDACTED  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS  
MOTION TO DISMISS AMENDED  
THIRD PARTY COMPLAINT**

The Honorable George H. Wu

Date: December 20, 2010

Time: 8:30 a.m.

Courtroom: 10

19 GATEWAY, INC.,

20 Third Party Plaintiff,

21 v.

22 NATIONAL ELECTRONICS  
23 WARRANTY LLC, a Delaware  
24 corporation, CHARTIS WARRANTY  
25 SERVICES, INC. (F.K.A. AIG  
26 Warranty Services and Insurance  
Agency, Inc.), a Delaware corporation;  
and CHARTIS WARRANTYGUARD,  
INC. (F.K.A. AIG Warranty Guard,  
Inc.), a Delaware corporation,

27 Third Party Defendants.

[Declaration of David M. Walsh,  
[Proposed] Order filed concurrently  
herewith]

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1 National Electronics Warranty LLC (“NEW”) hereby submits its  
2 Memorandum of Points and Authorities in support of its Motion to Dismiss  
3 Defendant and Third-Party Plaintiff Gateway, Inc.’s (“Gateway”) Amended  
4 Third-Party Complaint (“Amended TPC”).

5  
6 **I. INTRODUCTION**

7 In its motion to dismiss Gateway’s initial third-party Complaint, NEW  
8 questioned Gateway’s assertion of a claim for equitable indemnity in the face of an  
9 express contractual indemnification provision. Recognizing the clear weight of  
10 authority barring it from recovery under that theory, Gateway now brings its  
11 Amended TPC for contractual indemnity. Gateway’s initial third-party Complaint  
12 was legally unsound; now, its Amended TPC is both inadequately pled and contrary  
13 to the plain terms of the parties’ contract. It should be dismissed.

14 Gateway<sup>1</sup> and NEW are parties to a contract. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

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1 [REDACTED]  
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12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] Gateway's contractual indemnity  
19 claim must be dismissed.

20 Similarly, Gateway's claim for contribution fails because the potential  
21 liability for which Gateway seeks contribution (the claims asserted in Plaintiff's  
22 Second Amended Complaint ("SAC")) hinges upon Gateway's alleged failure to  
23 perform Gateway's obligations under the Gateway-NEW Contract. Gateway has  
24 not stated a viable claim for contribution because contribution *requires fault on the*  
25 *part of the purported indemnitor. Expressions at Rancho Niguel Ass'n v.*

26  
27 2  
28 [REDACTED]

1 *Ahmanson Devs., Inc.*, 86 Cal. App. 4th 1135, 1139 (2001) (listing elements for a  
 2 claim under Cal. Civ. Code § 1432). As described extensively below, NEW is  
 3 neither a joint tortfeasor nor a co-obligor with respect to Plaintiff's claims.  
 4 Accordingly, Gateway's Amended TPC is meritless and should be dismissed.

## 5 **II. FACTUAL BACKGROUND**

### 6 **A. Plaintiff Peter Wilson's Claims**

7  
 8 Plaintiff purchased a Gateway laptop from his college bookstore as a  
 9 freshman at Master's College. (SAC, ¶ 57.) Plaintiff purchased a Gateway ESP  
 10 with his laptop. (*Id.*) Plaintiff claims that, in February 2009, his computer needed  
 11 service. (*Id.* at ¶ 62.) When Plaintiff called Gateway looking for assistance,  
 12 Gateway allegedly directed him to another company. (*Id.* at ¶ 63.) After  
 13 discovering that company was out of business, Plaintiff asserts that he contacted  
 14 Gateway again for technical support and customer service. (*Id.* ¶ 64.) Gateway  
 15 allegedly refused to help Plaintiff this second time, disclaiming any responsibility  
 16 for the warranty Plaintiff purchased. (*Id.*) Plaintiff complained about Gateway to  
 17 the Better Business Bureau, and Gateway, for a third time, declined to acknowledge  
 18 responsibility for servicing Plaintiff's ESP. (*Id.*)

19  
 20 On October 16, 2009, Plaintiff sued Gateway in this Court for breach  
 21 of contract and unjust enrichment. On November 15, 2010, Plaintiff amended his  
 22 complaint to add NEW as a defendant and to assert additional causes of action  
 23 under the Consumer Legal Remedies Act ("CLRA") and California Business &  
 24 Professions Code section 17200 ("UCL").<sup>3</sup> Plaintiff summarizes his claims against  
 25 Gateway as follows: "Gateway relied on an unconscionable assignment provision to  
 26 transfer the Pro-ESP warranties to a company that was financially unable to service  
 27 those warranties, made misrepresentations to Pro-ESP warranty customers about

28 <sup>3</sup> NEW has filed a motion to dismiss Plaintiff's Second Amended Complaint  
 ("SAC"), currently set for hearing on December 20, 2010. (Dkt. 109.)

1 MPC's ability to service the warranties, refused to honor the warranties after  
 2 MPC's bankruptcy, and continued to 'deflect' Pro-ESP warranty customers to the  
 3 bankrupt MPC." (SAC ¶ 129.)

4 By contrast, Plaintiff's claims against NEW are wholly derivative of  
 5 Gateway's alleged neglect of its duties and fail to identify any obligation –  
 6 contractual or otherwise – owed by NEW to Plaintiff. Plaintiff asserts: (i) NEW  
 7 was "aware of Gateway's improper assignment of Pro-ESP warranties to MPC . . ."  
 8 (SAC ¶ 75); (ii) NEW "failed to do anything" to ensure that Gateway ESP  
 9 customers could "obtain the bargained-for service under their warranties" (SAC  
 10 ¶¶ 7, 75); and (iii) as a result of MPC's "stated inability to service" ESPs and  
 11 "Gateway's refusal to do so ... NEW therefore was required to reimburse at lower  
 12 amounts than had been anticipated." (SAC ¶ 76.) As explained below, the  
 13 Gateway-NEW Contract makes clear that NEW was not responsible for the  
 14 underlying misconduct of which Plaintiff complains. Plaintiff's allegations are  
 15 entirely consistent with this fact.

#### 16 **B. Gateway's Allegations In The Amended TPC**

17  
 18 Gateway's Amended TPC essentially argues that Plaintiff's inability to  
 19 obtain service pursuant to his Gateway ESP is NEW's fault.<sup>4</sup> [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26  
 27 <sup>4</sup> Tellingly, Gateway does not allege that NEW was responsible for Gateway's  
 28 "improper" assignment of its Professional Division to MPC, that NEW made  
 "misrepresentations" to ESP customers, or that NEW "deflected" ESP customers to  
 a bankrupt MPC, all as alleged in Plaintiff's SAC.

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[REDACTED]

[REDACTED]

**C. The Gateway-NEW Contract**

[REDACTED]

[REDACTED]

**1. Terms of the Gateway-NEW Contract**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

<sup>5</sup> The RSCAA is effective as of May 31, 2007. (Walsh Decl., Ex. "B.") Plaintiff's claims arose in February 2009. (SAC ¶ 62.)



1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
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 9 [REDACTED]

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11 **2. This Court Should Consider All Of The Gateway-NEW**  
**Contract—Not Just The Part Gateway Prefers**

12 Under the “incorporation by reference” doctrine, there is no question  
 13 that this Court may consider the whole Gateway-NEW Contract. *Knieval v. ESPN*,  
 14 393 F.3d 1068, 1076 (9th Cir. 2005). The Ninth Circuit is clear on this point.

15 Courts may consider documents outside the pleadings when a  
 16 plaintiff’s claim depends on the contents of a document, the defendant attaches the  
 17 document to its motion to dismiss, and the parties do not dispute the authenticity of  
 18 the document. (*Id.*) [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]

22 Gateway was sued because Plaintiff allegedly could not obtain service  
 23 under his warranty in February 2009. (Amended TPC ¶ 12.) Gateway alleges that  
 24 this failure is NEW’s fault. (*Id.* ¶ 28.) [REDACTED]  
 25 [REDACTED]  
 26 [REDACTED]

27 [REDACTED] The Court, therefore, may properly consider the Gateway-  
 28 NEW Contract in its entirety. A plaintiff is not permitted to survive a

1 Rule 12(b)(6) motion by simply omitting critical documents that form the basis of  
 2 his claims. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).  
 3 Application of the incorporation by reference doctrine is particularly appropriate in  
 4 this case, as its purpose is to prevent plaintiffs from taking factual statements out of  
 5 context, thereby protecting the Court from drawing unwarranted inferences from a  
 6 complaint. (*See, e.g., id.*) This Court, therefore, can and should consider the  
 7 Gateway-NEW Contract in its entirety.

### 8 **III. ARGUMENT**

#### 9 **A. Standard for a Motion to Dismiss**

10  
 11 A motion to dismiss under Rule 12(b) may be based on either the lack  
 12 of a cognizable legal theory or the absence of sufficient facts alleged under such a  
 13 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).  
 14 Although the Court accepts factual allegations in a complaint as true, those  
 15 allegations must provide the grounds for entitlement to relief, and may not be a  
 16 “formulaic recitation” of the elements of a cause of action. *Bell Atl. Corp. v.*  
 17 *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The  
 18 complaint’s “[f]actual allegations must be enough to raise a right to relief above the  
 19 speculative level, . . .” and a plaintiff must allege “enough facts to state a claim to  
 20 relief that is plausible on its face.” *Id.* at 555-56, 570.

#### 21 22 **B. Under the Parties’ Indemnity Arrangement, Gateway Is Solely** 23 **Responsible for Plaintiff’s Claims.**

24 [REDACTED]  
 25 [REDACTED]  
 26 [REDACTED] The plain language of the contract demonstrates that Gateway’s claim  
 27 for contractual indemnity fails as a matter of law.  
 28

## 1. Governing Law

“Express indemnity refers to an obligation that arises ‘by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.’” *Prince v. Pac. Gas & Elec. Co.*, 45 Cal. 4th 1151, 1158, 202 P.3d 1115 (2009). Generally, “an [indemnity] agreement is construed under the same rules that govern the interpretation of other contracts.” *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal. 4th 541, 552, 187 P.3d 424 (2008). Under California law, “effect is to be given to the parties’ mutual intent, as ascertained from the contract’s language, if it is clear and explicit.” *Liftech Consultants Inc. v. Samsung Shipbuilding & Heavy Indus., Ltd.*, No. C 10-2976, 2010 WL 4510905, at \*3 (N.D. Cal. Nov. 2, 2010). As critical here, “[t]he interpretation of a contract generally presents a question of law for the court to decide, unless the interpretation turns on the credibility of extrinsic evidence.” *Id.* (citing *Plaza Home Mortg., Inc. v. N. Am. Title Co., Inc.*, 184 Cal. App. 4th 130, 135 (2010)).

## 2. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1                    *Plaintiff claims that, while his Gateway ESP was still*  
2                    *valid, he contacted Gateway because his computer needed*  
3                    *repair. (SAC ¶ 62.)*

4                    • [REDACTED]  
5                    [REDACTED]  
6                    [REDACTED]

7                    *Gateway (allegedly) directed Plaintiff to a bankrupt*  
8                    *company for assistance, despite knowing that company*  
9                    *was out of business. (SAC ¶ 63.)*

10                  • [REDACTED]  
11                  [REDACTED]

12                  *Plaintiff then alleges he called Gateway back. Gateway*  
13                  *again refused to help Plaintiff, and disclaimed any*  
14                  *responsibility for Plaintiff's Gateway ESP service*  
15                  *contract. (SAC ¶ 64.)*

16                  • [REDACTED]  
17                  [REDACTED]

18                  *In all, Gateway is alleged to have denied its obligations to*  
19                  *Plaintiff on no fewer than three occasions.*  
20                  *(SAC ¶¶ 62-64.)*

21                  [REDACTED]  
22                  [REDACTED]  
23                  [REDACTED]  
24                  [REDACTED]  
25                  [REDACTED]  
26                  [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Amended TPC impermissibly seeks to have NEW indemnify Gateway for Gateway's own (alleged) failures. That is entirely improper and counter to the express, unambiguous terms of the parties' contract. *See Crawford*, 44 Cal. 4th at 552. Gateway's cause of action for express contractual indemnity must therefore be dismissed.

**C. Contribution Is Improper Because NEW Is Neither a Joint Tortfeasor Nor Co-Obligor With Gateway**

The plain language of the Gateway-NEW Contract establishes that (1) Gateway is solely responsible for Plaintiff's claims, and (2) [REDACTED]

[REDACTED]

[REDACTED] In addition, Gateway has not alleged a claim for contribution because Gateway, not NEW, is responsible for providing the service that Plaintiff alleges he did not receive. Plaintiff's claims are entirely predicated on allegations regarding Gateway's failure to provide service under the Gateway ESPs. In fact, *all* of Plaintiff's allegations fall squarely within Gateway's obligations detailed in the Gateway-NEW Contract. As the Court explained in *Ahmanson Developments*,

[t]he right to indemnity flows from payment of a joint legal obligation on another's behalf. (**Civ. Code, § 1432**; *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114 [32 Cal.Rptr.2d 263, 876 P.2d 1062].) The elements of a cause of action for indemnity are **(1) a showing of fault on the part of the indemnitor** and (2) resulting damages to the Indemnitee for which the indemnitor is contractually or equitably responsible.

1 86 Cal. App. 4th at 1139 (bold emphasis added).<sup>8</sup> To state a claim for contribution,  
 2 Gateway must plead facts sufficient to establish the first prong of the *Ahmanson*  
 3 *Developments* test.

4 Gateway cannot establish the first element of a cause of action for  
 5 contribution. Plaintiff alleges that when he attempted to obtain service under his  
 6 ESP, Gateway “refused” to honor Plaintiff’s ESP. (SAC ¶ 64.) [REDACTED]

7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED] NEW therefore has not been, and is not now, a joint tortfeasor or  
 12 co-obligor with regard to Plaintiff (or the putative class). Because the Gateway-  
 13 NEW Contract establishes that Gateway is responsible for Plaintiff’s claims, NEW  
 14 cannot be held liable for contribution here.

15 In sum, Plaintiff alleges he paid for, and did not receive, technical  
 16 support under his Gateway ESP in 2009. [REDACTED]

17 [REDACTED] The  
 18 Amended TPC thus essentially asks NEW to indemnify Gateway for Gateway’s  
 19 breach of contract. Gateway’s theory is nonsensical and counter to the parties’  
 20 express agreement. The Amended TPC should therefore be dismissed.

21  
 22  
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 27 <sup>8</sup> See also 14A Cal. Jur. 3d Contrib. & Indemn. § 64 (2010) (“The elements for  
 28 a cause of action for indemnity are: (1) a showing of fault of the indemnitor and (2)  
 resulting damages to the indemnitee for which the indemnitor is contractually or  
 equitably responsible.”) (citing *Ahmanson Devs.*, 86 Cal. App. 4th at 1139 (2001)).

1 **IV. CONCLUSION**

2 For the foregoing reasons, Gateway's Amended TPC for indemnity  
3 and contribution should be dismissed in its entirety.  
4

5 DATED: November 30, 2010 DAVID M. WALSH  
6 ADAM M. SEVELL  
7 PAUL, HASTINGS, JANOFSKY & WALKER  
8 LLP

9 By: /s/ David M. Walsh  
10 David M. Walsh

11 Attorneys for Defendant and Third-Party  
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13 NATIONAL ELECTRONICS WARRANTY  
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